
FAIRER USES

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In his insightful paper *Fair Use, Notice Failure, and the Limits of Copyright as Property*, Professor Joseph P. Liu asks a series of nested questions, the kernel of which is the most critical for the “fairness” of fair use.¹ First, he asks whether copyright law can be efficient as a property system, the goal of which is to form markets.² This is the question at the center of this Symposium.³ Second, Professor Liu focuses his fair use inquiry on third parties in the market system: not those formally transacting but the *audience* of copyrighted works.⁴ This is an important move in the analysis, reminding us of the copyright system’s diverse beneficiaries. This second question also helps us arrive at the third, even more specific focus of Professor Liu’s analysis of fair use: the *everyday* audience of copyrighted works.⁵ He wants to know how well the copyright-as-property system works for the vast majority of readers and writers writ large, that is: all of us.⁶ He thus appears less interested in markets—as in “property rights should make markets efficient for those buying and selling goods”—than he is in culture and our cultural environment. Instead of asking “does the copyright-as-property system make the buying and selling of cultural goods more efficient,” he asks “does the copyright-as-property system facilitate the circulation of cultural goods to the benefit of its audiences, e.g., the public?”⁷

Professor Liu’s critique of notice in copyright law draws on his earlier work, reminding us that copyright law begins with the public domain and the public

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¹ Joseph P. Liu, *Fair Use, Notice Failure, and the Limits of Copyright as Property*, 96 B.U. L. REV. 833, 834-35 (2016).

² *See id.*

³ *See* JAMES BESSEN & MICHAEL J. MEURER, PATENT FAILURE 1-2 (2009).

⁴ Liu, *supra* note 1, at 834.

⁵ *See id.* at 835.

⁶ *Id.*

⁷ To draw on the well-worn trespass analogy in property law, Professor Liu is not worried about those who wish to hunt for profit on someone else’s land—those who illegally copy to distribute for profit—but instead about those who hike and forage as a matter of their everyday—those who wander and live in terrain with boundaries that are ambiguous, unintuitive, and untamed.

interest.⁸ This “property” system serves first the general welfare and only secondarily private interests.⁹ Although certainly fair use is for both copyright owners and users, Professor Liu’s argument is that fair use, as the most significant of copyright exemptions, should, of all things, provide good (e.g., informative) notice to users in order to benefit the foundational principles of copyright: to enable audiences to become engaged citizens in a dynamic culture, e.g., to become culture-producers, not only culture-consumers.¹⁰

The focus on the fair user (rather than the copyright owner) helps us reframe the question in terms of subject. Who is the subject of copyright law to whom we must direct its guiding framework? We talk often (if not always) about how copyright incentivizes creation by enabling a financial benefit through monopolistic control,¹¹ and thus our focus seems to center on the owners. But Professor Liu challenges us to side-step the incentive talk, which is a smart move in light of growing research undermining the simplistic explanation of property incentives as the motor for productivity.¹² Professor Liu’s challenge instead focuses on those of us who are affected by copyright’s breadth and limitations—which is to say, *all of us*. He asks us to recognize that today, as with the common law and order regimes of the past 200 years (e.g., criminal law, contract, and tort), copyright affects us all. And because of this reality, we must start urgently thinking about how its notice structure works *on* us rather than *for* us.

⁸ See Joseph P. Liu, *Copyright and Breathing Space*, 30 COLUM. J.L. & ARTS 429, 429 (2007) (describing the “chilling effect” of uncertainty in copyright law on public art and expression); Joseph P. Liu, *Copyright Law’s Theory of the Consumer*, 44 B.C. L. REV. 397, 397 (2003) [hereinafter Liu, *Copyright Law’s Theory*] (suggesting a view of copyright law that emphasizes the rights of the consuming public); Joseph P. Liu, *Enabling Copyright Consumers*, 22 BERKELEY TECH. L.J. 1099, 1100-01 (2007) [hereinafter Liu, *Enabling Copyright Consumers*] (emphasizing consumer fair use rights and criticizing judicial decisions limiting companies’ ability to aid consumers in exploiting those rights); Joseph P. Liu, *The New Public Domain*, 2013 U. ILL. L. REV. 1395, 1398 (describing the cultural significance of public domain and advocating for more robust judicial protections in the face of copyright and trademark suits claiming broad owner rights).

⁹ See U.S. CONST. art. 1, § 8, cl. 8 (“Congress shall have the Power . . . [t]o promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries . . .”).

¹⁰ See Liu, *supra* note 1, at 835-36.

¹¹ See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF INTELLECTUAL PROPERTY LAW* 37-84 (2003); see also Diane Leenheer Zimmerman, *Copyright as Incentives: Did We Just Imagine That?*, 12 THEORETICAL INQUIRIES LAW 29, 30-31 (2011) (examining critically the traditional justification of copyright law as providing creative incentive).

¹² Liu, *supra* note 1, at 844-45. The literature on what motivates creativity is vast and largely undermines the intellectual property incentive story. For a concise summary of the literature, see Mark A. Lemley, *IP in a World Without Scarcity*, 90 N.Y.U. L. REV. 460, 492-93 nn.160-63 (2015).

Professor Liu frames his essay in terms of this question: How does the fair user understand the scope of the underlying property right?¹³ I might slightly reframe his investigation as: How does the fair user understand a work's purpose? This latter question may arrive at a similar analytical conclusion (copyright provides bad notice to users), but investigating the boundaries of copyright and fair use in terms of the *purposes* of creative works requires plumbing the assumptions underlying the system that may clarify problems that fuzzy notice causes or exacerbates. What is a copyrighted work for anyway? To talk of efficient marketplaces and transacting copyrighted goods suggests that the purpose of copyright is to financially enrich its owner while facilitating the distribution of goods to those who are most willing to pay. But that is hardly the whole of it.¹⁴ And that is why it is essential to invert the investigation, as Professor Liu does, from a property regime focusing on markets to a culture-producing regime focusing on fair creative practices and the everyday consumer in her community.

Professor Liu's main suggestion is that we abandon a property framework and substitute something less strict.¹⁵ He doesn't call it "more equitable" or "fairer," but his suggestion resonates with more discerning fault and remedial regimes that dominate our legal system and consider mitigation, contributory responsibility, and implied waiver or laches.¹⁶ I might call Professor Liu's suggestion a more "discriminatory" copyright regime in that it proposes abandoning a formal and actor-neutral application of copyright's liability framework in favor of one that takes into account—*accommodates*, in equality language—the realities of copyright's infiltration into our everyday lives.¹⁷

When speaking with everyday creators and inventors, those who spend the majority of their professional or personal time working on art or science, broadly construed, one observes practical application of "fair use" in the absence of a legal understanding of the term. Creators and inventors rarely consider fuzzy boundaries or proper notice in their day-to-day work. Instead, they describe norms and practices that resonate with the kind of permissive

¹³ Liu, *supra* note 1, at 834-45.

¹⁴ See JESSICA SILBEY, *THE EUREKA MYTH: CREATORS, INNOVATORS, AND EVERYDAY INTELLECTUAL PROPERTY* 292-95 (2015) (showing through qualitative empirical analysis that the motivations and mechanisms of producing and distributing creative work are diverse and only sometimes relate to wealth aggregation).

¹⁵ Liu, *supra* note 1, at 837, 848.

¹⁶ See *id.* at 848-51. Tort law, criminal law, and contract law all consider contributory responsibility and mitigation as part of either liability or damages analysis. Waiver and laches are deeply rooted in our common law, although the United States Supreme Court has recently held that laches are unavailable in copyright law. *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 134 S. Ct. 1662, 1673 (2014).

¹⁷ Christine Jolls, *Antidiscrimination and Accommodation*, 115 HARV. L. REV. 642, 643-44 (2002).

flexibility that Professor Liu advocates should form the basis of a renewed copyright system.¹⁸

Many describe a much *higher tolerance for infringement* because they describe copying and being strongly influenced by others as an inevitable part of creativity. A photographer explained that copying “[my style or artistic perspective is fine because] they would be doing something that is [in] their own experience, . . . that is what being an artist is. Picasso did that too.”¹⁹ Whether we consider this a form of “tolerated use”²⁰ or an exemption from liability does not matter to those doing the work. Here, a musician explains similar sentiments and practices:

A total copy rip-off, you know, not so great. But if someone’s just taking parts, I mean, and being influenced by it, that’s totally great—or inspired in some way by it. . . . [I]t’s all this big pool, and we’re throwing stuff into it. So if someone is being inspired to write something by it, or stealing an image . . . yeah, that’s unavoidable.²¹

A journalist explains a similar feeling: “Once my story is out there with its copyright, I just think ‘Oh, that’s kind of obnoxious’ if somebody copies it. But my story is already out, so I have performed my function. I mean, everyone kind of draws on each other.”²²

Many also describe a *higher standard for originality*, which would leave much more of their work (and others’) in the public domain, free to consume and use. This belief manifests in accounts of claiming and disclaiming ownership and control that portray smaller boundaries around their own work than copyright law otherwise provides. Reduced boundaries allow for more

¹⁸ All examples that follow are drawn from a long-form qualitative interview study I conducted from 2007 through 2012, the results of which were published in *The Eureka Myth*. SILBEY, *supra* note 14, at 287-95 (describing research methods and data analysis). The interview quotations provided in this essay were used for the research in *The Eureka Myth*, but many did not appear in the book. Those without citation to *The Eureka Myth* are being published here for the first time or are being published in a newly extended form. All interviewee names used in this article are pseudonyms designed to protect the privacy of the individuals interviewed. For a complete list of interviewees, see *id.* app. B at 297-303.

¹⁹ Interview with David (Sept. 28, 2011). David is a photographer who shows and sells his work but also (as of the time of the interview) works part time in retail. Earlier in his career, he worked full time as a fashion and advertising photographer. SILBEY, *supra* note 14, app. B at 303.

²⁰ Tim Wu, *Tolerated Use*, 31 COLUM. J.L. & ARTS 617, 617 (2008) (“‘Tolerated use’ is a term that refers to the contemporary spread of technically infringing, but nonetheless tolerated, use of copyrighted works.”); see also SILBEY, *supra* note 14, at 45, 117-18, 252-62.

²¹ SILBEY, *supra* note 14, at 118 (quoting an interview with Mary, a musician).

²² Interview with Jennifer (Sept. 9, 2009). Jennifer is a journalist, formerly a bureau chief in Europe for an international news organization, and currently on staff at a nationally syndicated radio station. She is also the coauthor of a well-regarded first book. SILBEY, *supra* note 14, app. B at 301.

borrowing and influences, narrowing the scope of copyright protection and broadening the range of permissive uses. Here is a novelist describing where she would draw the line:

I based [my character] on somebody I met. And then as I was thinking it through . . . I thought . . . this is kind of like Emma! That gives me confidence! . . . I think it gives writers . . . confidence when you can say, . . . “This book is just like this other famous book that . . . has lived in the public mind since . . . 1797.” . . . I think it’s very easy—and it’s not like I don’t fall prey to this—to feel like human nature has been pretty stable for a long time, and we have probably said everything there is to say about it [laughter] but conditions . . . of human nature . . . do change, have changed. . . . [W]e produce new food stuffs, . . . you know? And there are always these specific details that are new. So come up with a new story to tell me about those things. . . . [So] I think . . . using people as models, and to comfort yourself and . . . feel like you have the confidence to do this thing, because it can be done And so I think there’s a line between that, imitating the masters until you find your feet, and just taking somebody’s scaffolding for your own.²³

When transgressions occur, what happens? What do copyright owners seek in response to unlawful copying? They want much less than what the Copyright Act provides—often seeking fair remuneration (not maximum potential damages²⁴), reasonable profit sharing, and sometimes a nominal or dignitary fee—which supports Professor Liu’s argument for a moderated and “fairer” copyright system:²⁵

I would be willing to give things for free if it was a worthy project. . . . I mean, I’ve learned this with every negotiation. . . . I know what I think is a fair price, and . . . we feel like these little nonprofits, they should definitely charge if they have these things that they are offering. But if they say “we want to charge you \$1,000 for a picture,” I would say “You are crazy. . . . That will bust my budget. But you won’t bust my budget if you charge me \$100, and if we use more than 30 pictures, you’d knock it down to 50 per.”²⁶

²³ Interview with Elizabeth (Aug. 24, 2009). Elizabeth is a writer, formerly a copyeditor at various national magazines, who holds an MFA in writing. She is writing a novel and is supported financially by her husband. SILBEY, *supra* note 14, app. B at 301.

²⁴ 17 U.S.C. § 504(c) (2012) (providing for a range of damages between \$200 and \$150,000 per infringing work).

²⁵ See Liu, *supra* note 1, at [15].

²⁶ Interview with Melanie (Jan. 31, 2011). Melanie is an award-winning documentary filmmaker who has her own film production company. She regularly works in public television, but she began her career as a photographer, photographic journalist, and, later, assistant producer to an acclaimed filmmaker. SILBEY, *supra* note 14, app. B at 302.

As previously described, some also shrug off copying as an inevitable part of being an artist that is not worth the hassle or concern of pursuing. Here, a musician dismisses what feels like a misappropriation, reframing it as inevitable lapse about which an artist should be generous:

There are a couple awkward moments where one person will have worked on a song for a while, but then another person puts out a record and there's imagery from that song on their record but the record comes out first so it looks like the other person is copying . . . [A fellow songwriter] came up to me and was like "Oh my God, I think I stole a line from you for this song." So we just chat amongst ourselves when we notice that stuff, it clears the air. But no one's ever a creep about it.²⁷

In addition to fair sharing, artists, writers, and filmmakers describe the expectation of and desire for attribution—and they mistakenly think copyright law requires it:

As long as it's attributed, you know, I think that's the trend. So I expect that more and more that will happen. I don't like it, because when you cut and paste and mash up, it's very hard to tell what is yours and what isn't, and so there's a slippery slope in the claim of ownership. But, I'm not gonna go crazy about that. As long as people are not claiming . . . something they didn't do.²⁸

A novelist echoes this sentiment, more strongly underscoring the dignity inherent in attribution and seeking permission with or without a nominal payment:

I would be flattered to be quoted. I mean, it's very flattering and pleasing to think that something that you have written has kind of entered the public domain. . . . I think that probably what enrages people [is] the failure to ask permission. I bet if people asked permission, a lot of writers would either charge a small amount of money, or they would say, "Sure." You know, it could be free. "Take it, and I'm glad."²⁹

Do everyday creators brood about fuzzy boundaries such as the difference between ideas and expression³⁰ or compulsory licensing rules versus outright

²⁷ Interview with Mary (Dec. 14, 2009). Mary is a singer-songwriter with more than three solo albums and a busy professional performing schedule. She is in her mid-thirties, and represented by an agent and a well-regarded label. At the time of the interview, she had a flexible part-time job, but at the time of publication of *The Eureka Myth*, she was working on her music full time. SILBEY, *supra* note 14, app. B at 301.

²⁸ Interview with Ann (Oct. 25, 2011). Ann is an award-winning documentary filmmaker who has her own film production company and recently won several national awards for her films. She is a former staff producer for public television. SILBEY, *supra* note 14, app. B at 303.

²⁹ SILBEY, *supra* note 14, at 254.

³⁰ Compare 17 U.S.C. § 102(a) (2012) (protecting "original works of authorship fixed in any tangible medium of expression"), with *id.* § 102(b) ("In no case does copyright

exemptions?³¹ No. Like so many other legal regimes that exist in everyday life “on the ground” or “in action,” as legal sociologists describe,³² copyright law is tolerated as a less than perfectly-understood system and one that is largely applied intuitively by the everyday user. People do not ignore copyright law or refuse its application. But most believe there is some *reasonableness* in copyright law as there is in negligence law, contract rules, and traffic regulation.

And why shouldn't there be reasonableness in copyright law, with fair use especially? Fair use is a normative baseline—a critical status quo that structures all of the exclusive rights.³³ It is not an affirmative defense but, historically and statutorily, a negative space where copyright protection does not exist.³⁴ In his essay, Professor Liu compares fair use to nuisance law, not as a right to use but as a limit on the right of exclusion.³⁵ I would make this point stronger and phrase it in the affirmative, despite the nomenclature of fair *use*. I would say instead: fair users' rights come first. Copyright owners do not have rights where fair users do.

Professor Liu writes that because fair use is a fundamental baseline, and because it is so unpredictable in its outcome, it presents a particularly thorny notice problem.³⁶ There are, however, persuasive studies showing that fair use's applications are more predictable than previously thought and that creative communities have strong norms to fill the gap where clear legal determinations of fair use may be lacking.³⁷ To be sure, there will always be hard cases.³⁸ However, we don't have to agree that fair use is unpredictable to

protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.”).

³¹ Compare *id.* § 115(a) (providing for a compulsory license for reproducing and distributing nondramatic musical works, e.g., the “cover” license), with *id.* § 107 (delineating the fair use limitation on scope of copyright).

³² E.g., STEWART MACAULAY ET AL., LAW IN ACTION: A SOCIO-LEGAL READER 1-6 (2007).

³³ See 17 U.S.C. § 107 (“Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work . . . for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.”).

³⁴ Lydia Pallas Loren, *Fair Use: An Affirmative Defense?*, 90 WASH. L. REV. 685, 688 (2015).

³⁵ Liu, *supra* note 1, at 839.

³⁶ *Id.* at 835.

³⁷ See generally Barton Beebe, *An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005*, 156 U. PA. L. REV. 549 (2008); Matthew Sag, *Predicting Fair Use*, 73 OHIO ST. L.J. 47 (2012); Pamela Samuelson, *Unbundling Fair Uses*, 77 FORDHAM L. REV. 2537 (2009).

³⁸ Some recent, highly-disputed fair use cases include *Cariou v. Prince*, 714 F.3d 694, 698-99 (2d Cir. 2013), and *Salinger v. Colting*, 607 F.3d 68, 83 (2d Cir. 2010) (finding fair

appreciate the ambitious and practical aspect of Professor Liu's essay, which is a continuation of his previous work bringing the audience of copyrighted works into the foreground of our analysis about what to do with copyright law in the twenty-first century.³⁹ As he writes, "fair use . . . is relevant to a far greater universe of individuals" than before the advent of digital content and dissemination.⁴⁰ Thus, understanding fair use's contours becomes all the more urgent.

We could put the problem in even starker terms. Fair use is more critical today than three decades ago because digital content is more central to how we live and communicate in our everyday lives.⁴¹ The boundaries of expressive works are ambiguous, unintelligible or even counterintuitive to the reasonable user. As such, and in light of copyright's strict liability and draconian damages regime, *we are all thieves and pirates*. This state of affairs is intolerable in our society, which is built upon the rule of law.

The legitimacy of our copyright laws rests on being able to tell the difference between a pirate and a reasonable or "fair" user. There is some scholarship recommending an infusion of reasonableness into copyright.⁴² Professor Liu's work on the "copyright consumer" pushes us in this direction as well.⁴³ The reasonable expectation of "copyright consumers" is that, as consumers, we do more than consume; we also share and repurpose content, which requires and assumes a robust fair use limitation.⁴⁴ If we follow this direction, we must also embrace nuances of context, as Professor Liu recognizes.⁴⁵ This is not too difficult, as we do it in many other areas of law. Moreover, context specificity is a laudable feature of our legal regimes, which focus on particular parties, industries, or harms. Context specificity recognizes, first, that copyright should not be (nor *is*) a one-size-fits-all system, and, second, that inequality in access, ability, and situation matters in determining

use exemption unlikely to be successful for "sequel" to *Catcher in the Rye*, entitled *60 Years Later*).

³⁹ See *supra* note 8 and accompanying text; see also Joseph P. Liu, *Copyright and Time: A Proposal*, 101 MICH. L. REV. 409, 410 (2003) (advocating for reconsideration of copyright term length in order to ensure an increased "ability of others to re-use, critique, transform, and adapt the copyrighted work without permission of the copyright owner").

⁴⁰ Liu, *supra* note 1, at 843.

⁴¹ To contemplate the ubiquity and necessity of copying today, consider simply: forwarded email, hyperlinks, weblogs, phone cameras, and shared or curated image sites.

⁴² See, e.g., Oren Bracha & Patrick R. Goold, *Copyright Accidents*, 96 B.U. L. REV. 1025, 1070 (2016); see also Shyamkrishna Balganesh, *Foreseeability and Copyright Incentives*, 122 HARV. L. REV. 1569, 1603 (2009); Eva E. Subotnik, *Intent in Fair Use*, 18 LEWIS & CLARK L. REV. 935, 964 (2014).

⁴³ Liu, *Copyright Law's Theory*, *supra* note 8, at 416; Liu, *Enabling Copyright Consumers*, *supra* note 8, at 1101; Liu, *supra* note 1, at 852.

⁴⁴ LAWRENCE LESSIG, REMIX: MAKING ART AND COMMERCE THRIVE IN THE HYBRID ECONOMY 98-99 (2008).

⁴⁵ See Liu, *supra* note 1, at 837-38.

whether the use is or should be deemed “fair.”⁴⁶ By *inequality*, I do not mean denigrating unequal treatment of the kind we consider ripe for Fourteenth Amendment analysis.⁴⁷ I mean only to reframe context specificity of the kind Professor Liu proposes in terms of other, related legal principles, such as equality (of resources and access) and distributive justice.⁴⁸

Professor Liu is in fact advocating for a copyright system that includes equitable principles when identifying infringers and meting out liability. He puts it in terms of discarding a copyright-as-property framework given the already established language in copyright law and scholarship about informational burdens, market formation, and alienability as central to copyright as an economic system.⁴⁹ But property (and copyright) law is more than a mechanism for economic transactions or wealth aggregation. As we learned long ago, property (and copyright) is personal.⁵⁰ Nuisance law as a subset of property law may be subject to cost-benefit analysis reducible to monetary terms. But for those of us who have been subject to a neighbor’s nuisances, we know money is a sliver of the equation. The substantive issues are peace in our homes and communities, and being able to sleep and to stay healthy. Copyright law, whether or not a property system, is also about more than money and markets. It is social and political. Copyrighted works are like children to their authors, constraining alienability through a rebuke of the market’s ambition.⁵¹ Copyrighted works can mobilize demagoguery or democracy through their promiscuity and rhetorical force.⁵² Copyright law affects community development and sustainability, identity and self-determination, and depends on bedrock principles of freedom of expression, with self-expression (and expression generally) central to political and personal empowerment.⁵³ Copyright is about the production and circulation of culture,

⁴⁶ *Cf. id.*

⁴⁷ Classic examples in U.S. constitutional law of unequal treatment that violate the anti-hierarchy principle and imply inferiority or denigration of one party by another include *Romer v. Evans*, 517 U.S. 620 (1996), *Frontiero v. Richardson*, 411 U.S. 677 (1973), and *Brown v. Board of Education*, 347 U.S. 483 (1954).

⁴⁸ Liu, *supra* note 1, at 843.

⁴⁹ *Id.* at 848-49; *see also* LANDES & POSNER, *supra* note 11, at 41-60.

⁵⁰ *See, e.g.*, MARGARET JANE RADIN, REINTERPRETING PROPERTY 36-37 (1993); CAROL M. ROSE, PROPERTY AND PERSUASION: ESSAYS ON THE HISTORY, THEORY AND RHETORIC OF OWNERSHIP 105-06 (1994).

⁵¹ SILBEY, *supra* note 14, at 156-58.

⁵² *E.g.*, Neil Weinstock Netanel, *Copyright and a Democratic Civil Society*, 106 YALE L.J. 283, 286 (1996).

⁵³ *E.g.*, JULIE E. COHEN, CONFIGURING THE NETWORKED SELF: LAW, CODE, AND THE PLAY OF EVERYDAY PRACTICE 55 (2012).

which for most of us concerns the participation in and enjoyment of everyday life—now, in the digital age, more than ever.⁵⁴

When we think in these terms, equality concerns of the kind that we consider in terms of distributive justice should come naturally as mitigating circumstances and differential treatment justified by comparatively lop-sided starting positions. Adjacent legal doctrines are replete with such considerations. We tolerate discriminating application of criminal sentences in light of a defendant's specific history and circumstances. We expect that first-time thieves will not be punished to the fullest. We hope that reasonableness as a concept in accident law and plain meaning in contract law is something that we can derive, at least in part, from our lived experiences in society. And so why not with copyright, too?

I think the most trenchant criticism of this approach is that most copyrights are under-enforced and that copyright owners tolerate a whole host of infringing activity already. As such, why align fair use with everyday expectations (assuming that doing so will broaden fair use's scope) when most people can still engage in uses they need or want in the first place? This is the criticism that asks: Where is the real problem of copyright chill?

First, these critics see only copyright theft—uncompensated uses by those who could and should pay but who are not forced to pay. If fair use were as broad in law as it is in practice, we would not be calling these tolerated uses or under-enforcements at all, but fair uses that the copyright owner has no right to police. Second, and more importantly, the critique that highlights under-enforcement fundamentally misses the point of copyright law by inverting the focus from the audience to the owner. And that is Professor Liu's point. Why should the users be at the whim of the owners (who can decide to sue or not to sue) when copyright exists for the audience's and users' benefit (at least equally, if not primarily)? To say we should submit to the status quo, leaving the copyright balance up to the "tolerance" of copyright owners, invites more and broader enforcement in a system designed to be porous.⁵⁵ This is especially worrisome given ubiquitous enforcement mechanisms by digital algorithms and other technological measures, and the increasing cost of defense litigation.⁵⁶ In our digital age, uses once routinely tolerated must no longer be tolerated if copyright owners choose otherwise. Today, copyright owners hold much of the power and thus, the pervasive experience is of

⁵⁴ See generally *id.*; see also Julie E. Cohen, *Creativity and Culture in Copyright Theory*, 40 U.C. DAVIS L. REV. 1151, 1190-92 (2007); Julie E. Cohen, *The Place of the User in Copyright Law*, 74 FORDHAM L. REV. 347, 372 (2005).

⁵⁵ But see Wu, *supra* note 20, at 626.

⁵⁶ See, e.g., Jennifer M. Urban & Laura Quilter, *Efficient Process or "Chilling Effects"? Takedown Notices Under Section 512 of the Digital Millennium Copyright Act*, 22 SANTA CLARA COMPUTER & HIGH TECH. L.J. 621, 624 (2006); see also Christopher A. Cotropia & James Gibson, *Copyright's Topography: An Empirical Study of Copyright Litigation*, 92 TEX. L. REV. 1981, 2018-20 (2014) (highlighting peculiar problems of copyright litigation, including high costs).

copyright misuse, overbroad copyright claims, and cease-and-desist practices that take advantage of financial inequalities.⁵⁷ The obscurity of harmless personal uses, such as home copies and email attachments, is fading, especially given our changing licensing models.⁵⁸ Bloggers, fans, and everyday writers and artists are at the whim of copyright owners. Leaving things in the hands of these interested parties to enforce or not enforce their copyrights as they wish, as the leftover of the breathing space that fair use was supposed to preserve shrinks, seems a recipe for copyright inequality.

Professor Liu is precisely right when he says near the end of his essay that we should make peace with what he describes as “uncertainty” in copyright law,⁵⁹ but which I hope we can recast as greater “fairness” in our system. This would require taking seriously what everyday users consider fair.⁶⁰ As Professor Liu suggests, better alignment of fair use with actual practices and expectations would require changes and empirical investigations.⁶¹ But why shouldn’t copyright law be better aligned with expectations held by its primary beneficiaries (the public) if—and this is a crucial caveat—the alignment doesn’t reduce the production and dissemination of creative works, which is the goal of copyright law? But this too is an empirical question without a self-evident answer. It is unclear that less copyright protection leads to less productivity or dissemination of cultural or useful goods.⁶² If in fact copyright is *less* essential to the production and dissemination of expressive works than previously believed—again, an empirical question that we could understand better through targeted empirical research—we might be less wary of *fairer*

⁵⁷ JOHN TEHRANIAN, INFRINGEMENT NATION: COPYRIGHT 2.0 AND YOU 129-35 (2011) (describing widespread over-claiming of copyright protection); Brad A. Greenberg, *Copyright Trolls and the Common Law*, 100 IOWA L. REV. BULL. 77, 77-79 (2015) (describing trolling and Matthew Sag’s empirical research on the subject).

⁵⁸ Jessica Litman, *Lawful Personal Use*, 85 TEX. L. REV. 1871, 1918 (2007); Maria A. Pallante, *The Next Great Copyright Act*, 36 COLUM. J.L. & ARTS 315, 333 (2013) (describing growth of microlicensing platforms).

⁵⁹ Liu, *supra* note 1, at 849.

⁶⁰ Those powerful enough to lobby Congress succeed at securing their own exemptions via statute. See JESSICA LITMAN, DIGITAL COPYRIGHT 23 (2001). In this way, fair use is for the everyday user, while the established industry or organization with representation in lawmaking has in the past effectively protected itself via the democratic process with explicit statutory privileges or exemptions.

⁶¹ See Liu, *supra* note 1, at 835.

⁶² SILBEY, *supra* note 14, at 277 (“[T]he qualitative data from this study should undermine the frequent assertions that producing intellectual goods requires the set of robust external incentives that our IP regimes provide.”); see also KAL RAUSTIALA & CHRISTOPHER SPRIGMAN, THE KNOCK OFF ECONOMY: HOW IMITATION SPARKS INNOVATION 168 (2012); Elizabeth L. Rosenblatt, *Intellectual Property’s Negative Space: Beyond the Utilitarian*, 40 FLA. ST. U. L. REV. 441, 461 (2013); Elizabeth L. Rosenblatt, *A Theory of IP’s Negative Space*, 34 COLUM. J.L. & ARTS 317, 319 (2011) (describing industries where innovation thrives without IP protection).

uses and accept a copyright system that facilitates more equal rights for audiences, as well as owners, as should be the case if copyright is truly in the public interest.